K Balasubramaniam, Liquidator for Kosmopolitan Credit & Leasing Sdn Bhd (In Liquidation) v MBf Finance Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–11 OF 2003 (W)
HAIDAR CJ (MALAYA), ABDUL MALEK AHMAD AND SITI NORMA YAAKOB FCJJ
5 NOVEMBER 2004

Companies and Corporations — Winding up — Liquidators — Power of liquidator over property in possession of receiver and manager — Demand for return of property of wound-up company in possession of receiver and manager — Effect of power of attorney by subsequently wound up company — Companies Act 1965 ss 233, 277, 300 & 305 — Companies (Winding-Up) Rules 1972 r 66

Companies and Corporations — Winding up — Receivership — Extent of power of receiver and manager over property of wound-up company — Liquidator demanded for return of property of wound-up company in possession of receiver and manager — Effect of power of attorney by subsequently wound up company — Companies Act 1965 ss 233, 277, 300 & 305 — Companies (Winding-Up) Rules 1972 r 66

Companies and Corporations — Proof of debt — Secured creditor — Whether secured creditor must prove debt to liquidator — Companies Act 1965 s 291 —Companies (Winding-Up) Rules 1972 rr 78 & 82

Companies and Corporations — Receivership — Power of receivers — Extent of power of receiver and manager over property of wound-up company — Whether receiver and manager appointed by secured creditor may operate outside winding-up without proof of debts — Companies Act 1965 ss291 — Bankruptcy Act 1967 s 42 & Sch C

Companies and Corporations — Winding up — Power of court — Transfer of cases by or against company to winding-up court — Companies (Winding-Up) Rules 1972 r 163

In 1982, Koperasi Serbaguna Kosmopolitan Bhd ('the Koperasi')— subsequently purchased by the first respondent on 16 August 1991 — made advances to Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') — the liquidated company in this case — which were secured by fixed and floating charges on KCL's assets under a debenture ('the debenture') which were duly registered under s 108 of the Companies Act 1965 ('the Act'). The first respondent's predecessor had on 8 February 1991 appointed the second respondent as receivers and managers to take over all the assets and liabilities of KCL under the powers contained in the debenture. On 16 May 1991, the High Court ordered KCL to be wound-up and appointed the appellant as the liquidator. In the course of his investigations into the affairs of KCL, the appellant issued a notice in Form 33 under the Rules and s 277(5) of the Act demanding the return of all the property of KCL in the second respondent's possession. The second respondent

rejected the appellant's demand. The appellant filed Originating Summons D6–24–98 of 1992 seeking declarations that the debenture was null and void, the appointments of the second respondent as receivers and managers were also void and seeking the return of the charged assets which were all movable assets from them.

In the meantime, the appellant took out an *ex parte* summons seeking a number of directions as to the future conduct of the winding-up. The High Court made, *inter alia*, the following orders:

(i) that the Originating Summons No D6–24–98 of 1992 filed by the appellant in another division of the High Court questioning *inter alia* the legality of the debenture, be transferred to the winding-up court ('the transfer order'), pursuant to r 163 of the Rules;

(ii) The appellant to file notices to all creditors including the secured creditors to prove their debts ('the proof order');

(iii) The appellant to acquire from the second respondent *inter alia*, the accounts, documents, ledgers and moneys of the company ('the acquiring order'); and

(iv) The appellant to commence legal proceedings against the first respondent to recover two sums of money totaling RM9.745 million, which the appellant alleged had been wrongly paid by KCL to the Koperasi and which should be returned to the appellant as the liquidator ('commencement of proceedings order');

Upon application by the second respondent, the High Court set aside the orders. Aggrieved, the appellant pursued the matter in the Court of Appeal but his appeal against the setting aside of the orders was dismissed. Following the dismissal of his appeal, the appellant obtained the leave of the court to refer the following six questions of law to the Federal Court:

(1) Upon the court ordering a company incorporated pursuant to the provisions of the Act to be wound-up and appointing a liquidator:

(i) to what extent and within what parameters could a receiver and manager appointed under a power contained in an instrument, exercise powers over the assets of the wound-up company?

(ii) whether a receiver and manager appointed pursuant to a power contained in an instrument, by reason of either s 233 and/or s 277 of the Companies Act 1965 ('the Act'), read together with ss 300 and 305 of the Act and r 66 of the Companies (Winding-Up) Rules 1972 ('the Rules') continues to exercise custody and control over the properties of the company that had been wound-up and which properties 'appears' to or is 'prima facie' entitled to such a company, even after the court-appointed liquidator had demanded its return;

(iii) whether, after a winding-up order is made by the court, are the rights and powers of a receiver and manager appointed under a power contained in an instrument, with regard to the documents, books and property of a company, 'superior to' and/or take precedence over the rights and powers of a court-appointed liquidator;

(2) Whether the principles enunciated by the then Supreme Court in *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 are restricted in scope and limited to the powers of a receiver and manager appointed under a power contained in an instrument, to dispose of a parcel of land on which a legal charge had been created under the National Land Code ('the Code') or applies to all the assets, be it movable or immovable, of the company that is under liquidation and in respect of which a liquidator had been appointed;

(3) Whether a receiver and manager appointed pursuant to an instrument by a person claiming to be a secured creditor, operates outside the winding-up, without such debts being admitted or proved to the liquidator?

(4) Whether the answers to any of the above questions will be different if the instrument which provides for the appointment of a receiver and manager incorporates thereto, a power of attorney given by the company which had since been wound-up and whether such a power of attorney can survive or exist or be valid and effective after the company is wound-up by reason of s 4 read together with ss 300 and 305 and the other provisions in the Companies Act 1965?

(5) By reason of r 163 of the Rules whether the court, which has ordered the winding-up of the company, is required in law to transfer to itself all the other matters that are pending or instituted or may be instituted in the other courts?

(6) whether a secured creditor, upon being called by a liquidator, to prove its debts by filing a proof of debt, by reason of s 291 of the Companies Act read together with rr 78 and 82 of the Companies (Winding-Up) Rules 1972 made thereunder, is obliged in law to do so?

Held, answering the questions posed to it and dismissing the appeal with costs:

(1a) Based on s 233(1) of the Act, the appellant's right to have the property in the custody of the second respondent transferred to him under s 277(5) is subject to whether KCL is *prima facie* entitled to such property based on the same principle that the appellant's right could not be greater than KCL's (see paras 15 and 16); *High Crest Motors Pty Ltd (in liq), Re* [1979] 3 ACLR 564 followed. Upon the winding-up of a company and the appointment of a liquidator, the receiver and manager ceases to be the agent of the company but he continues to retain his possessory rights

conferred upon him by the debenture to take custody and control of all the assets charged under the debenture (see para 54).

(1b) Section 233 and/or 277 of the Act, read together with ss 300 and 305 of the same Act and r 66 of the Rules do not apply to a receiver and manager appointed pursuant to a power contained in a debenture, and the receiver and manager is entitled to possession and control of the charged assets despite a demand made by the liquidator for their return, unless those assets are redeemed by the liquidator or there is a surplus of proceeds which has to be returned to the liquidator (see para 54). Since the second respondent was appointed by the first respondent, the secured creditor and not by KCL, the company in liquidation, the second respondent were not receivers of KCL or officers of KCL within the definition of s 4(1)(b) of the Act. As such the appellant could not rely on s 277(5) to demand the return of the charged assets in the custody of the second respondent, as the latter are not officers of KCL (see para 27); *High Crest Motors Pty Ltd (in liq), Re* [1979J 3 ACLR 564 followed. Sections 233(1) and 277(5) of the Act have no application where assets form part of an equitable charge as the second respondent has legal right to possess them pursuant to the terms of the debenture. By operation of law those assets are no longer assets to which KCL *is or appears to be entitled to or prima facie entitled* unless they are first redeemed from the first respondent. By reason of ss 233(1) and 277(5) their retention by the second respondent does not fall within the penal provisions of s 300(1)(b)(ii) (see para 31).

(1c) Following a winding-up, the receiver and manager loses his status as agent of the company. He continues to retain his possessory powers as a receiver and manager whilst the liquidator exercises his statutory powers and duties under the Act. There is no question of any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them by the Act in the case of the liquidator and by the debenture in the case of the receiver and manager (see paras 32, 33 and 54); *Expo International Pty Ltd & Anor v Chant & Ors* [1979] 3 ACLR 888 followed.

(2) The principles in *Kimlin* should be restricted in scope and limited to the powers of a receiver and manager to sell land charged under the Code. *Kimlin* should not apply to assets comprised in a fixed and floating charge contained in a debenture. The assets may include immovable as well provided they are not charged under the Code (see paras 40 and 54); *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 distinguished.

(3) The combined effect of sub-ss 291(1) and (2) of the Act and s 42 of the Bankruptcy Act 1967, and Schedule C thereto is that there is no mandatory requirement for a secured creditor to come under the liquidation. He has

the option of either relying entirely on his security for which he is not obliged to submit a proof of debt. If he however decides to come under the liquidation, he submits proof of his debt and will be entitled to a dividend in respect of the unsecured portion. If he does not submit proof of his debt, then pursuant to para 16 of Schedule C, he shall be excluded from participating in a dividend (see para 45). In short, a receiver and manager appointed pursuant to an instrument operates outside the winding-up, unless of course he intends to claim in the liquidation in which case he has to prove his debt (see para 54); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liq)* [1995] 2 MLJ 600 followed.

(4) A winding-up order does not cancel a power of attorney nor does s 4 read together with ss 300 and 305 and the other provisions of the Act. It would not be different if the instrument which provides for the appointment of a receiver and manager incorporates a power of attorney as well (see paras 48 and 54); *Wellington Steam Ferry Co (Ltd) (in liq) & Anor v The Wellington Deposit, Mortgage, and Building Association (Ltd)* (1915) 34 NZLR 913 followed.

(5) Rule 163 of the Rules gives power to a judge to transfer to himself any action, cause or matter pending, brought or continued by or against the company. The judge has the discretion to order such a transfer as the rule provides that the court 'shall have the power' and not 'shall transfer to itself.' As such there is no mandatory requirement that a winding-up court order transfer of all related matters instituted in the courts to itself (see paras 50 and 54).

(6) A secured creditor is not obliged to submit a proof of debt when called upon to do so by the liquidator if he relies upon his security for payment. He need only submit his proof of debt if he gives up his security and proves for the whole debt or if he decides to prove for the unsecured portion (see paras 53 and 54).

(7) According to r 163 of the Rules, the jurisdiction to transfer relates only to matters brought by or against the company. Since Originating Summons D6–24–98 of 1992 for which the appellant sought a transfer to the Winding-Up Court was filed by the appellant in his personal name as liquidator of KCL, it was not an action brought by the company. Since the Commercial Division of the High Court has jurisdiction to hear the Originating Summons, transfer of it to the Winding-Up Court becomes unnecessary particularly when the insolvency of KCL has nothing to do with the challenge to the validity of the debenture and the appointment of the second respondent as receivers and managers. For that reason the Court of Appeal was correct when it affirmed the decision of the High Court to set aside the transfer order (see para 57).

(8) Since it was for the secured creditor to initiate the process of enforcing his security, there was no obligation on the part of the liquidator to issue any notice to the secured creditor to prove his debt. As such, the proof order cannot be maintained (see para 59).

(9) The appellant had no right to demand the return of the charged assets in the second respondent's possession. Since there was a dispute over claims to the charged assets, this would be finally determined when the Originating Summons which the appellant had initiated against the second respondent is heard and disposed off. Until that issue is determined in the appellant's favour, the debenture is valid and so is the appointment of the second respondent as receivers and managers and to that end the setting aside of the acquiring order had been correctly made (see para 60).

(10) Whilst s 236(2)(a) empowered the appellant to institute an action in court, it did not require him to obtain the leave of the court to do so. To that extent, the commencement of proceedings order is superfluous and unnecessary (see para 61). On the facts of this case, no leave was necessary for the appellant to commence the proceedings since s 236(2)(a) of the Act is broad enough to allow him to do so (see para 64).

[**Bahasa Malaysia summary**

Dalam tahun 1982, Koperasi Serbaguna Kosmopolitan Bhd ('Koperasi tersebut') — yang akhirnya dibeli oleh responden pertama pada 16 Ogos 1991 — telah memberi pendahuluan kepada Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') — syarikat dalam penyelesaian di dalam kes ini — yang dijamin oleh caj tetap dan terapung ke atas aset-aset KCL di bawah satu debentur ('debentur tersebut') yang mana telah didaftarkan di bawah s 108 Akta Syarikat 1965 ('Akta tersebut'). Responden pertama yang terdahulu telah pada 8 Februari 1991 melantik responden kedua sebagai penerima dan pengurus untuk mengambil alih kesemua aset dan liabiliti-liabiliti KCL di bawah kuasa-kuasa yang terkandung di bawah debentur tersebut. Pada 16 Mei 1991, Mahkamah Tinggi telah memerintahkan KCL untuk digulung dan melantik perayu sebagai penyelesai. Semasa penyiasatan mengenai urusan-urusan KCL, perayu telah mengeluarkan satu notis Borang 33 di bawah Kaedah-kaedah dan s 277(5) Akta tersebut yang menuntut pengembalian kesemua harta KCL yang berada di dalam milikan responden. Responden kedua menolak tuntutan perayu. Perayu memfailkan Saman Pemula D6–24–98 tahun 1992 untuk suatu perisytiharan bahawa debentur tersebut batal dan tak sah, pelantikan responden kedua sebagai penerima dan pengurus adalah tak sah dan pengembalian kesemua aset yang dicaj yang merupakan harta alih daripada mereka.

Sementara itu, perayu mengeluarkan satu saman ex parte meminta beberapa arahan mengenai perlaksanaan penggulungan yang akan datang. Mahkamah Tinggi telah membuat, antara lain, perintah-perintah berikut:

(i) Bahawa Saman Pemula No D6–24–98 tahun 1992 yang difailkan oleh perayu di bahagian yang satu lagi di Mahkamah Tinggi yang menyoal antara lain kesahan debentur tersebut, dipindahkan ke mahkamah penggulungan ('perintah pindah itu'), di bawah k 163 Kaedah-kaedah tersebut;

(ii) Perayu dikehendaki memfailkan notis-notis kepada kesemua pemiutang-pemiutang termasuklah si piutang bercagar untuk membuktikan hutang mereka ('perintah bukti');

(iii) Perayu untuk mengambil dari responden kedua antara lain, akaun-akaun, dokumen-dokumen, lejar-lejar dan wang syarikat tersebut ('perintah pengambilan'); dan

(iv) Perayu untuk memulakan prosiding undang-undang terhadap responden pertama untuk mendapat kembali dua jumlah wang yang berjumlah secara keseluruhan sebanyak RM9.745 juta, yang mana didakwa oleh perayu telah dibayar secara silap oleh KCL kepada koperasi tersebut dan hendaklah dikembalikan kepada perayu sebagai penyelesai ('perintah permulaan prosiding').

Atas permohonan responden kedua, Mahkamah Tinggi telah mengetepikan perintah-perintah tersebut. Terkilan, perayu merayu ke Mahkamah Rayuan. Akan tetapi rayuannya untuk mengetepikan perintah-perintah tersebut ditolak. Oleh yang demikian, perayu kemudiannya memohon kebenaran mahkamah untuk merujuk enam soalan undang-undang yang berikut ke Mahkamah Persekutuan:

(1) Atas perintah mahkamah yang mengarahkan sesuatu syarikat di bawah peruntukan-peruntukan Akta tersebut untuk digulung dan melantik penyelesai:

(i) Setakat mana dan dalam had-had mana seseorang penerima dan pengurus yang dilantik di bawah kuasa yang terkandung di dalam sesuatu surat cara, dapat menggunakan kuasa-kuasanya terhadap aset-aset syarikat yang digulung?

(ii) Sama ada penerima dan pengurus yang dilantik di bawah satu kuasa yang terkandung di dalam sesuatu surat cara, disebabkan oleh sama ada s 233 dan/atau s 277 Akta Syarikat 1965 ('Akta tersebut'), dibaca bersama dengan s 300 dan 305 Akta tersebut dan k 66 Kaedah-kaedah (Penggulungan) Syarikat 1972 ('Kaedah tersebut') masih dapat menggunakan jagaan dan kawalan terhadap harta-harta syarikat yang telah digulung dan harta yang mana 'dianggap' atau secara 'prima facie' yang berhak kepada syarikat sebegitu, walaupun selepas penyelesai yang dilantik oleh mahkamah menuntut pengembaliannya;

(iii) Sama ada, selepas perintah penggulungan dibuat oleh mahkamah, hak-hak dan kuasa-kuasa seorang penerima dan penyelesai yang dilantik di bawah satu kuasa yang terkandung di dalam sesuatu surat cara, berhubung dengan dokumen-dokumen, buku-buku dan harta sesuatu syarikat, 'lebih tinggi' dan/atau mendahului hak-hak dan kuasa-kuasa seseorang penyelesai yang dilantik oleh mahkamah;

(2) Sama ada rukun-rukun yang dinyatakan oleh Mahkamah Agong dahulunya di dalam *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 terhad dalam skop dan terhad kepada kuasa-kuasa seseorang penerima dan pengurus yang dilantik di bawah satu kuasa yang terkandung di dalam sesuatu surat cara, untuk melupuskan sebidang tanah yang mana satu gadaian undang-undang telah dibuat di bawah Kanun Tanah Negara ('Kanun tersebut') atau terpakai kepada kesemua aset-aset, sama ada boleh alih atau takboleh alih, sesuatu syarikat yang di bawah penyelesaian dan yang mana seorang penyelesai telah dilantik;

(3) Sama ada seorang penerima dan pengurus yang dilantik di bawah sesuatu surat cara oleh seseorang yang mendakwa sebagai si piutang bercagar, bertindak di luar penggulungan, tanpa perlu hutang-hutang sedemikian diakui atau dibuktikan kepada penyelesai;

(4) Sama ada jawapan-jawapan untuk salah satu dari persoalan-persoalan di atas akan berbeza jika surat cara yang memperuntukkan pelantikan seorang penerima dan pengurus terkandung di dalamnya, satu surat kuasa wakil yang diberikan oleh syarikat yang mana telah digulung dan sama ada surat kuasa wakil sedemikian boleh wujud atau masih ada atau masih sah dan mempunyai kesan selepas syarikat tersebut digulung kerana s 4 dibaca bersama dengan ss300 dan 305 dan peruntukan-peruntukan lain di bawah Akta Syarikat 1965;

(5) Disebabkan oleh k 163 Kaedah tersebut sama ada mahkamah, yang telah memerintahkan penggulungan syarikat tersebut, diperlukan di bawah undang-undang untuk memindahkan kepada dirinya sendiri kesemua hal-hal lain yang masih belum selesai atau yang telah dimulakan di mahkamah lain;

(6) Sama ada si piutang bercagar, setelah dipanggil oleh penyelesai, untuk membuktikan hutangnya dengan memfailkan bukti hutang, oleh kerana s 291 Akta Syarikat dibaca bersama kk 78 dan 82 Kaedah tersebut, wajib di bawah undang-undang berbuat demikian.

Diputuskan, menjawab soalan-soalan yang dimajukan dan menolak rayuan dengan kos:

(1a) Berpandukan s 233(1) Akta tersebut, hak perayu untuk mendapatkan hartanah yang berada di bawah jagaan responden kedua dipindahkan kepadanya di bawah s 277(5) tertakluk kepada sama ada KCL adalah *prima facie* berhak kepada hartanah tersebut berasaskan prinsip yang sama bahawa perayu tidak mungkin lebih berhak berbanding dengan KCL (lihat perenggan 15 dan 16); *High Crest Motors Pty Ltd (in liq)*, *Re* [1979J 3 ACLR 564 diikut. Selepas penggulungan sesuatu syarikat dan pelantikan seorang penyelesai, penerima dan pengurus berhenti menjadi agen kepada syarikat tersebut tetapi dia tetap memegang hak kepunyaan yang diberikan kepadanya melalui debentur untuk mengambil jagaan dan kawalan terhadap semua aset yang dicagarkan di bawah debentur tersebut (lihat perenggan 54).

(1b) Seksyen 233 dan/atau 277 Akta, dibaca bersama ss 300 dan 305 Akta yang sama dan k 66 Kaedah tersebut tidak terpakai kepada penerima dan pengurus yang dilantik menurut kuasa yang terkandung di dalam debentur, dan penerima dan pengurus berhak kepada milikan dan kawalan aset-aset yang dicagar walau pun terdapat permintaan daripada pelikuidasi untuk memulangkannya, melainkan aset-aset tersebut ditebus oleh pelikuidasi atau terdapat hasil jualan yang berlebihan yang perlu dipulangkan semula kepada pelikuidasi (lihat perenggan 54). Oleh sebab responden kedua telah dilantik oleh responden pertama, si piutang bercagar dan bukannya oleh KCL, syarikat dalam penyelesaian, responden kedua bukanlah penerima kepada KCL atau pegawai-pegawai KCL seperti di bawah maksud s 4(1)(b) Akta. Maka dengan itu, perayu tidak boleh bergantung pada s 277(5) untuk meminta pemulangan aset-aset yang dicagar di dalam jagaan responden kedua, oleh sebab yang terkemudian bukanlah pegawai-pegawai KCL (lihat perenggan 27); *High Crest Motors Pty Ltd (in liq), Re* [1979J 3 ACLR 564 diikut. Seksyen 233(1) dan 277(5) Akta tidak terpakai apabila aset-aset merangkumi sebahagian daripada cagaran ekuiti oleh sebab responden kedua mempunyai hak undang-undang untuk memiliki mereka menurut terma-terma debentur. Melalui perjalanan undang-undang, aset-aset tersebut bukan lagi aset yang mana KCL umpama berhak kepadanya atau *prima facie* berhak kepadanya melainkan mereka ditebus terlebih dahulu daripada responden pertama. Disebabkan oleh ss 233(1) dan 277(5), pengekalan mereka oleh responden kedua tidak jatuh di bawah peruntukan-peruntukan penal s 300(1)(b)(ii) (lihat perenggan 31).

(1c) Berikutan suatu penggulungan, penerima dan pengurus tersebut hilang akan statusnya sebagai agen kepada syarikat. Dia tetap mengekalkan kuasa-kuasa milikannya sebagai penerima dan pengurus manakala pelikuidasi menggunakan kuasa-kuasa dan tugas-tugas statutorinya di bawah Akta tersebut. Tidak terdapat persoalan mana yang bertaraf lebih tinggi. Mereka wujud sebelah-menyebelah dengan setiap satu menggunakan kuasa dan tugasnya secara berasingan yang diberikan kepada mereka oleh Akta dalam kes pelikuidasi dan melalui debentur di dalam kes penerima dan pengurus (lihat perenggan 32, 33 dan 54); *Expo International Pty Ltd & Anor v Chant & Ors* [1979] 3 ACLR 888 diikut.

(2) Rukun-rukun di dalam *Kimlin* patut dihadkan kepada kuasa-kuasa seseorang pemerian dan pengurus untuk menjual tanah yang dicagarkan di bawah Kanun. *Kimlin* tidak patut digunakan kepada set-aset yang dibawah caj tetap dan terapung yang terkandung di dalam debentur. Aset-aset tersebut mungkin termasuk aset tak alih juga asalkan ianya tidak digadaikan di bawah Kanun tersebut (lihat perenggan 40 dan 54); *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 dibezakan.

(3) Kesan bersama sub-ss 291(1) dan (2) Akta tersebut dan s 42 Akta Kebankrapan 1967, dan Jadual C ialah tidak terdapat keperluan mandatori bagi si piutang bercagar untuk tertakluk kepada penyelesaian. Beliau mempunyai pilihan untuk sama ada bergantung secara keseluruhannya kepada jaminannya yang mana beliau tidak perlu untuk mengemukakan satu bukti hutang. Jika beliau mengambil keputusan untuk datang dibawah penyelesaian, beliau hendaklah mengemukakan bukti hutang dan akan berhak kepada dividen berhubung dengan bahagian yang tidak dijamin itu. Jika beliau tidak mengemukakan bukti hutangnya, maka di bawah perenggan 16 Jadual C, beliau akan terkeluar dari terlibat dengan dividen (lihat perenggan 45). Secara ringkas, seseorang penerima dan pengurus yang dilantik di bawah sesuatu surat cara bertindak di luar penggulungan, melainkan jika beliau ingin menuntut dalam penyelesaian yang mana beliau dikehendaki untuk membuktikan hutangnya (lihat perenggan 54); *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liq)* [1995] 2 MLJ 600 diikuti.

(4) Perintah penggulungan tidak membatalkan surat kuasa wakil begitu juga dengan s 4 dibaca bersama ss 300 dan 305 dan peruntukan-peruntukan yang lain di dalam Akta tersebut. Ianya tidak akan menjadi berlainan jika surat cara tersebut yang memperuntukkan pelantikan seorang penyelesai dan pengurus mengandungi surat kuasa wakil juga (lihat perenggan 48 dan 54); *Wellington Steam Ferry Co (Ltd) (in liq) & Anor v The Wellington Deposit, Mortgage, and Building Association (Ltd)* (1915) 34 NZLR 913 diikuti.

(5) Kaedah 163 Kaedah tersebut memberi kuasa kepada seseorang hakim untuk memindahkan kepada dirinya sebarang tindakan, kausa atau perkara yang belum diselesaikan, yang dibawa atau yang diteruskan atau terhadap syarikat tersebut. Hakim mempunyai budi bicara untuk memerintahkan pemindahan sedemikian kerana kaedah memperuntukkan bahawa mahkamah 'mempunyai kuasa' dan tidak 'boleh memindahkan kepadanya.' Oleh yang demikian tidak terdapat keperluan mandatori bagi mahkamah penggulungan memerintahkan pemindahan kesemua perkara-perkara berkaitan yang dimulakan di mahkamah-mahkamah kepada dirinya (lihat perenggan 50 dan 54).

(6) Seseorang sipiutang bercagar tidak perlu untuk mengemukakan satu bukti hutang apabila disuruh berbuat demikian oleh penyelesai jika bergantung kepada jaminannya untuk bayaran. Beliau hanya perlu mengemukakan bukti hutangnya jika beliau mengabaikan jaminannya dan membuktikan keseluruhan hutangnya atau jika beliau ingin membuktikan bahagian yang tidak dijamin (lihat perenggan 53 dan 54).

(7) Menurut k 163 Kaedah tersebut, bidang kuasa memindah berhubung hanya kepada perkara-perkara yang dibawa oleh atau dibawa terhadap syarikat tersebut. Oleh kerana Saman Pemula D6–24–98 tahun 1992 yang mana perayu memohon pemindahan kepada mahkamah penggulungan

difailkan oleh perayu dalam nama peribadinya sebagai penyelesai KCL, ianya bukanlah satu tindakan yang dibawa oleh syarikat tersebut. Oleh kerana Bahagian Dagang Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar Saman Pemula tersebut, pemindahannya ke mahkamah penggulungan adalah tidak perlu terutama apabila ketaksolvenan KCL tidak berkait dengan pertikaian mengenai kesahan debentur tersebut dan pelantikan responden kedua sebagai penerima dan pengurus. Oleh sebab itu, Mahkamah Rayuan adalah betul apabila ia mengesahkan keputusan mahkamah tinggi yang mengetepikan perintah pindahan (lihat perenggan 57).

(8) Oleh kerana sipiutang bercagar perlu untuk memulakan proses bagi dirinya untuk menguatkuasakan jaminannya, tidak terdapat tanggungjawab pada pihak penyelesai untuk mengeluarkan sebarang notis kepada sipiutang bercagar untuk membuktikan hutangnya. Dari itu, perintah bukti tidak boleh dikekalkan (lihat perenggan 59).

(9) Perayu tidak mempunyai hak untuk menuntut pengembalian aset-aset yang digadai yang berada di dalam milikan responden kedua. Oleh kerana tidak terdapat sebarang pertelingkahan mengenai tuntutan terhadap aset-aset yang digadai, ini akan pada akhirnya ditentukan apabila Saman Pemula yang dimulakan oleh perayu terhadap responden kedua dibicarakan dan diputuskan. Sehingga isu ini diputuskan memihak kepada perayu, debentur tersebut sah dan begitu juga dengan pelantikan responden kedua sebagai penerima dan pengurus dan oleh itu, pengenepian perintah pemilikan telah dibuat dengan betulnya (lihat perenggan 60).

(10) Sementara s 236(2)(a) memberi kuasa kepada perayu untuk memulakan sesuatu tindakan di mahkamah, ia tidak memerlukan perayu untuk mendapat kebenaran mahkamah untuk berbuat demikian. Setakat itu, perintah permulaan prosiding adalah tidak perlu (lihat perenggan 61). Pada fakta kes ini, kebenaran adalah tidak perlu bagi perayu untuk memulakan prosiding kerana s 236(2)(a) Akta tersebut sudah cukup luas untuk membenarkannya berbuat demikian (lihat perenggan 64).

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1056–1087.

For cases on powers of receiver and manager, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 578–585.

For cases on proof of debt, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 530–531.

For liquidator's powers, see 6 *Halsbury's Laws of Malaysia*, para [110.129].

For powers of receivers, see 6 *Halsbury's Laws of Malaysia*, para [110.082].

For proof of debt by secured creditor, see 6 *Halsbury's Laws of Malaysia*, para [110.313].

For transfer of action by court, see 6 *Halsbury's Laws of Malaysia*, para [110.050].

Cases referred to

Australian Home Finance Pty Ltd, Re [1956] VLR 1 (refd)
Bayswood Pty Ltd, Re [1981] 6 ACLR 107 (refd)
Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liquidation) [1995] 2 MLJ 600 (folld)
Expo International Pty Ltd & Anor v Chant & Ors [1979] 3 ACLR 888 (folld)
High Crest Motors Pty Ltd (in liq), Re [1979J 3 ACLR 564 (folld)
Kian Joo Holdings Sdn Bhd Re (in liq); Mohd Jabbar bin Abdul Majid [1999] 6 MLJ 352 (refd)
Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805 (distd)
Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd [1984] 1 MLJ 266 (refd)
Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt)) [1993] 2 AMR 3400 (refd)
Sanderson v Classic Car Insurances Pty Ltd [1985] 10 ACLR 115 (refd)
Standard Insurance Co Ltd, Re [1963] 80 WN (NSW) 1355 (refd)
Statewide Investments Ltd (in liq), Re [1981] 6 ACLR 265 (refd)
Wellington Steam Ferry Co (Ltd) (in liq) & Anor v The Wellington Deposit, Mortgage, and Building Association (Ltd) (1915) 34 NZLR 913 (folld)

Legislation referred to

Bankruptcy Act 1967 s 42, paras 9–16 to Sch C
Companies (Winding-Up) Rules 1972 rr 38, 66, 66(1), 66(2), 78, 79, 82, 163, Form 33
Companies Act 1961 [Vic] ss 5(1), 263(3)
Companies Act 1965 ss 4, (1)(b), 218, 223, 233, (1), 235(2), 236(1)(e), (2)(a), 237(3), 277, (5), 291, (1), 291(2), 300, (1)(b)(ii), 305
Companies Code [NSW] s 379(3)
Powers of Attorney Act 1949 s 6
Property Law Act 1908 [NZ] s 101

Appeal from: Civil Appeal No W–02–17 of 1994 (Court of Appeal, Kuala Lumpur)

Shahul Hameed Amirudin (Woo Lai Mei and Vijay Raj with him) (Zul Rafique & Partners) for the appellant.
N Chandran (Reza Dzul Karnain with him) (Albar & Partners) for the first respondent.
Izabella de Silva (Iza Ng Yeoh & Kit) for the second respondent.

Siti Norma Yaakob FCJ (delivering judgment of the court):

[1] Leave was granted to the appellant to refer six questions of law to us and these questions as framed read as follows:

(1) Upon the court ordering a company incorporated pursuant to the provisions of the Companies Act 1965 (Act 125) to be wound-up and appointing a liquidator:

A (i) to what extent and within what parameters could a receiver and manager appointed under a power contained in an instrument, exercise powers over the assets of the wound-up company?

(ii) whether a receiver and manager appointed pursuant to a power contained in an instrument, by reason of either s 233 and/or s 277 of the Companies Act 1965, read together with ss 300 and 305 of the same Act and r 66 of the Companies (Winding-Up) Rules 1972 continues to exercise custody and control over the properties of the company that had been wound-up and which properties 'appears' to or is *prima facie* entitled to such a company, even after the court appointed liquidator had demanded its return?

(iii) whether, after a winding-up order is made by the court, are the rights and powers of a receiver and manager appointed under a power contained in an instrument, with regard to the documents, books and property of a company, 'superior to' and/or take precedence over the rights and powers of a court appointed liquidator?

(2) Whether the principles enunciated by the then Supreme Court in *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 are restricted in scope and limited to the powers of a receiver and manager appointed under a power contained in an instrument, to dispose of a parcel of land on which a legal charge had been created under the National Land Code 1965 or applies to all the assets, be it movable or immovable, of the company that is under liquidation and in respect of which a liquidator had been appointed?

(3) Whether a receiver and manager appointed pursuant to an instrument by a person claiming to be a secured creditor, operates outside the winding-up, without such debts being admitted or proved to the liquidator?

(4) Whether the answers to any of the above questions will be different if the instrument which provides for the appointment of a receiver and manager incorporates thereto, a power of attorney given by the company which had since been wound-up and whether such a power of attorney can survive or exist or be valid and effective after the company is wound-up by reason of s 4 read together with ss 300 and 305 and the other provisions in the Companies Act 1965?

(5) By reason of r 163 of the Companies (Winding-Up) Rules 1972, whether the court which has ordered the winding-up of the company, is required in law to transfer to itself all the other matters that are pending or instituted or may be instituted in the other courts?

(6) Whether a secured creditor, upon being called by a liquidator, to prove its debts by filing a proof of debt, by reason of s 291 of the Companies Act read together with rr 78 and 82 of the Companies (Winding-Up) Rules 1972 made thereunder, is obliged in law to do so?

[2] The events leading to the issues raised in the six questions are in no way disputed and they go as far back as 1982. In that year Koperasi Serbaguna Kosmopolitan Bhd ('the Koperasi') made advances to Kosmopolitan Credit & Leasing Sdn Bhd ('KCL') which were secured by fixed and floating charges on KCL's assets under a debenture dated 17 March 1982 ('the debenture'). The charges have been duly registered under s 108 of the Companies Act 1965 ('the Act'), and the fact of registration is very significant as it renders the debenture valid and effective and it binds the appellant.

[3] By an order of court dated 7 January 1987, the Koperasi was placed under receivership and pursuant to a rescue scheme formulated by Bank Negara Malaysia, the Koperasi's deposits and liabilities were taken over by Kewangan Usahasama Makmur Bhd ('KUMB'). As consideration, all the Koperasi's assets including the debt due from KCL were assigned by the receivers of the Koperasi to KUMB through a sale and purchase agreement dated 19 April 1998. By a second assignment dated 16 November 1990, the receivers of the Koperasi assigned the debenture together with all the moneys and interest secured thereby to KUMB.

[4] On 8 February 1991, KUMB appointed the second respondent as receivers and managers to take over all the assets and liabilities of KCL under the powers contained in s 8.02 of the debenture.

[5] On 16 May 1991, following the filing of a creditor's petition under s 218 of the Act by two creditors, the High Court ordered KCL to be wound-up and appointed the appellant as the liquidator.

[6] The next event saw MBf Finance Bhd, the first respondent purchasing KUMB through a sale and purchase agreement dated 16 August 1991, and all the rights and liabilities of KUMB became vested in the first respondent by an order of court dated 30 October 1991.

[7] In the course of his investigations into the affairs of KCL, the appellant issued a notice in Form 33 under the Companies (Winding-Up) Rules 1972 ('the Rules'), and s 277(5) of the Act demanding the return of all the property of KCL in the second respondent's possession. The appellant also filed two reports pursuant to sub-ss 235(1) and (2) of the Act disclosing some irregularities in the manner in which loans were made by the Koperasi to KCL, in the management of the debenture and questioning the appointments of the second respondent. When the second respondent rejected the appellant's demand to return all the property of KCL in their possession the appellant filed Originating Summons D6–24–98 of 1992 on 14 May 1992, seeking declarations that the

debenture is null and void, the appointments of the second respondent as receivers and managers are also void and seeking the return of the charged assets which are all movable assets from them. This matter is still pending.

[8] In the meantime pursuant to r 38 of the Rules read with s 235(2) of the Act, the appellant took out an *ex parte* summons seeking a number of directions as to the future conduct of the winding-up. On 30 September 1993, the High Court made the following five orders:

(i) The appellant to employ Messrs Albar Zulkifly & Yap as his solicitors to represent him in the winding-up proceedings ('the appointment order').

(ii) Originating Summons No D6–24–98–92 filed by the appellant in another Division of the High Court questioning *inter alia* the legality of the debenture, be transferred to the Winding-Up Court ('the transfer order'), pursuant to r 163 of the Rules.

(iii) The appellant to file notices to all creditors including the secured creditors to prove their debts ('the proof order').

(iv) The appellant to acquire from the second respondent inter alia, the accounts, documents, ledgers and monies of the company ('the acquiring order').

(v) The appellant to commence legal proceedings against the first respondent to recover two sums of money totalling RM9.745 million, which the appellant alleges had been wrongly paid by KCL to the Koperasi and which should be returned to the appellant as the liquidator ('commencement of proceedings order').

[9] After being served with these orders, the second respondent filed an application to have them set aside and the High Court agreed with them and set aside the five orders and condemned the appellant to pay costs personally to the second respondent. That was on 8 July 1994.

[10] Aggrieved, the appellant pursued the matter in the Court of Appeal and on 5 May 2003, his appeal against the setting aside of the five orders was dismissed save for costs which the court held should not be borne by the appellant personally but be paid out of the assets of KCL. It was following the dismissal of his appeal that the appellant obtained the leave of this court on 27 August 2003, to refer the six questions of law that appear at the beginning of this judgment.

[11] Before responding to the questions, I need to clarify one aspect of the charges in the debenture which KCL had created in favour of the first respondent. The fixed charge covers the movable property of KCL and they are identified under s 4.01 (a) of the debenture, whilst the floating charge is over other property which includes immovables as well. However from the very language of the

demand dated 14 February 1992, sent by the appellant in Form 33 of r 66(2) of the Rules, it is clear that what the second respondent have in their custody and control are the books and accounting records of KCL. As such, we are only concerned with the movable assets of KCL and under these circumstances and on the authority of *Mahadevan & Anor v Manilal & Sons (M) Sdn Bhd* [1984] 1 MLJ 266 the fixed charge created by the debenture is an equitable one.

[12] Basically all the six questions relate to the respective rights of the second respondent as receivers and managers appointed under the debenture and that of the appellant, the court appointed liquidator following the winding-up of the company and the main issue raised is whether the respective rights of the second respondent and the appellant can exist independently of the other or have the rights of the former merged with the rights of the latter following the winding-up order.

[13] Question 1 comes in three parts and is concerned with the status of the second respondent following the winding-up of the company. In essence answers are sought as to the extent and powers of the second respondent, whether they can continue to function as receivers and managers and whether their powers are inferior to that of the appellant insofar as they relate to the properties of the company that are in the custody and control of the second respondent.

[14] To answer question 1.1 one need only refer to the express language of ss 233(1) and 277(5) of the Act to determine the true extent of the powers of a receiver and manager to deal with the assets of a wound-up company. These two sections form part of the scheme of collection of assets of a company in liquidation and for ease of reference the provisions of those two sections insofar as they are material are set out as follows.

> 233(1) Where a winding up order has been made … the liquidator … shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.
>
> 277(5) The court may require any … receiver … to transfer to the liquidator … forthwith or within such time as the court directs any money, property, books and papers in his hands to which the company is prima facie entitled.

[15] Clearly s 233(1) imposes a statutory duty on the appellant to take under his control and custody all the property and things to which KCL *is or appears to be entitled*. As such the appellant's right to possession is no greater than KCL's own right and is limited to possession of property or things which KCL *is or appears to be entitled*. See the case of *Re High Crest Motors Pty Ltd (in liq)* [1979] 3 ACLR 564.

[16] Likewise the appellant's right to have property in the custody of the second respondent transferred to him under s 277(5) is subject to whether KCL is *prima facie entitled* to such property based on the same principle that the appellant's right cannot be greater than KCL's.

[17] The relevant sub-s of s 300 of the Act referred to in question 1.2 insofar as it relates to the facts of this appeal is sub-s (1)(b)(ii), the provisions of which read as follows.

> 300(1) Every person, who, being a … present officer of a company which is being wound-up —
>
> (a) …
>
> (b) does not deliver to the liquidator, or as he directs —
>
> (i) … ; or
>
> (ii) all books and papers in his custody or under his control belonging to the company and which he is required by law to deliver up, shall be guilty of an offence against this Act which is punishable with imprisonment for two years or a fine of five thousand ringgit.

[18] Like s 300(1)(b)(ii), the provisions of 305 are also penal in nature and they empower the court to assess damages against delinquent officers and those provisions read as follows.

> 305(1) If in the course of winding-up it appears that … any … officer has misapplied or retained or become liable or accountable for any money or property of the company … the court may on the application of the liquidator examine into the conduct of that …officer and compel him to repay or restore the money or property …

[19] For completeness I also reproduce the provisions of sub-rr (1) and (2) of r 66 of the Rules as question 1.2 makes reference to that rule as well.

> 66(1) The powers conferred on the courts by s 277(5) may be exercised by the liquidator.
>
> (2) Any … officer of a company which is being wound up shall on notice from the liquidator in Form 33 and within such time as he shall by notice in writing … transfer into the hands of the liquidator any money or property or books or papers which are in his hands and to which the company is prima facie entitled, and the court may on application of the liquidator order the … transfer.

[20] An '*officer of a company*' identified in the sections and rule that I have referred has been defined by s 4(1)(b) of the Act '*to include a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument.*'

[21] Question 1.2 poses the issue as to whether the second respondent are bound by law to transfer all the movable property of KCL in their custody and control following a demand for their return by the appellant. The second respondent can only do so if KCL *is entitled to or appears to be entitled* to or *prima facie entitled* to such property under ss 233(1) and 277(5) of the Act and under r 66(2) of the Rules. The meaning of the phrase '*to which the company is prima facie entitled*' has been defined by the Australian case of *Re High Crest Motors* when

dealing with ss 5(1) and 263(3) of the Australian Companies Act 1961 (Vic), the provisions of which are *in pari materia* with our ss 4(1)(b) and 277(5). The facts of the Australian case are almost on all fours as our case. On 6 December 1976, a creditor of High Crest Motors Pty Ltd appointed receivers and managers pursuant to a power to do so contained in a debenture given by High Crest to the creditor. On 23 December 1976, liquidators were appointed when High Crest went into voluntary liquidation. The receivers and managers had obtained all books of accounts as well as other assets of the company.

[22] On an application by the liquidators in December 1977, O'Bryan J made an order under s 263(3) for the surrender by the receivers and managers of the relevant property. In setting aside the order, the Supreme Court of Victoria made two rulings, firstly whether the receivers were *'officers of the company'* within s 263(3) and secondly on the facts of the case whether *High Crest* can be said to be *'prima facie entitled'* to the charged assets in the receivers' hands.

[23] On the first ruling, a distinction was drawn between the receiver appointed by a company who was a secured creditor and which subsequently went into liquidation and the receiver appointed by a secured creditor of the company which was subsequently wound up.

[24] The fact of the distinction is most significant as the appellant relies on the definition of an officer under s 4(1)(b) of the Act to include a receiver of the company within the meaning of s 277(5). The effect of such distinction is expressed by Harris J in the following manner.

> The respondents made their application against the appellants on the basis that they were 'receivers' of the company. A receiver who had been appointed by a company which was a secured creditor and which subsequently went into liquidation, would be a person who would get into his hands money, property and books and papers of the company's debtor. He would be under a duty to pay over to the company money he received, to go in satisfaction of the company's debt and he might well be bound under the terms under which he had been appointed to hand over to the company property and books and papers of the debtor which he had obtained. In the case of such a receiver, it would be, I would think, a simple matter for a liquidator of the company which had appointed the receiver, to prove that he had in his hands 'money property or books and papers' to which the company was prima facie entitled.
>
> The situation is to be contrasted with the situation which exists where the 'receiver of the company' is, true enough, a person who falls literally within that expression, but who is a receiver who receives the money property and books and papers of the company which has gone into liquidation as the appointee of a secured creditor of that company. The position of such a receiver can be shown by the position of the appellants in this appeal.

[25] Citing the definition of *'officer'* under s 5(1) of the Australian Act, and applying it to the expression *'officer of the company'* in s 263(3), the learned judge had this to say.

If this definition were applied to the expression '*officer of the company*' in s 263(3), the result would be to bring in any person who was a receiver and manager of the company, so that, if a receiver and manager appointed by a secured creditor under his security was not a 'receiver of the company' within the subsection, nevertheless that person would be within the scope of the section as an 'officer of the company'. However, the definition of 'officer' only applies 'unless the contrary intention appears'. Some of the persons within the definition of 'officer' are clearly persons who are 'officers' within s 263(3) (eg directors, the secretary and employees of the company) but, in my opinion, the context of s 263(3) shows a contrary intention with respect to the application of the definition to the case of a receiver and manager where that person has been appointed by a secured creditor of the company.

I am thus of the opinion that the appellants are not 'receivers of the company' or 'officers of the company' within s 263(3) and that therefore the court has no jurisdiction to make an order under that section against them.

[26] Likewise our s 4(1)(a) and (b) defines *'officer'* in the following manner.

4(1) In this Act, *unless the contrary intention appears* —

'officer' in relation to a corporation includes —

(a) any director, secretary, or employee of the corporation;

(b) *a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument.*' (Emphasis is mine)

[27] Since the second respondent were appointed by the first respondent, the secured creditor and not by KCL, the company in liquidation and on the authority of *High Crest*, the second respondent are not receivers of KCL or officers of KCL within the definition of s 4(1)(b) of the Act. As such the appellant cannot rely on s 277(5) to demand the return of the charged assets in the custody of the second respondent, as the latter are not officers of KCL.

[28] When determining the legal status of the appellant receivers in *High Crest* the Supreme Court further held at p 567 of the report that: '*no question of title arises; the appellants' claim is possessory, based on their legal rights which flow from the debenture. The cases earlier referred to would appear to give priority in possession to a person who had a legal right to possession by lien or otherwise and so entitle him to defeat a liquidator's summary claim to possession … the phrase "to which the company is prima facie entitled" relates to an entitlement to possession, and a liquidator's right cannot be greater than the company's right*'.

[29] *Re High Crest* also held that the only way that an insolvent company or its liquidators could recover its property was by way of a redemption action against the debenture holder but even that too would be dependent upon the company satisfying all the obligations under the debenture.

[30] The only marked difference between the Australian case and our case is the fact that whilst the company in *Re High Crest* was in voluntary liquidation, KCL was wound-up compulsorily at the instance of two creditors. Nevertheless

the decision is good law as Part X, Division 4, Subdivision (1) of the Act in which s 277(5) falls under, applies to every mode of winding-up. To that extent the Court of Appeal was correct when it relied on the Australian case.

[31] To conclude ss 233(1) and 277(5) of the Act have no application where assets form part of an equitable charge as the second respondent have a legal right to possess them pursuant to the terms of the debenture. By operation of law those assets are no longer assets to which KCL *is or appears to be entitled to or prima facie entitled* unless they are first redeemed from the first respondent. By reason of ss 233(1) and 277(5) their retention by the second respondent does not fall within the penal provisions of s 300(1)(b)(ii). On the facts of this appeal, s 305(1) if at all, can only apply after the whole debt due to the first respondent has been settled in full from the proceeds realized by the second respondent and if there should be any surplus and the second respondent chose to retain the surplus or failed to account, only then will the second respondent come within the ambit of s 305.

[32] On appointment, a receiver and manager becomes an agent of the company and that agency ceases upon the winding-up of the company. Nevertheless, he still retains his possessory right to the charged assets and his status is best described by Edgar Joseph Jr FCJ in the case of *Kimlin Housing Development Sdn Bhd (Appointed Receiver and Manager) (in liq) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805 ('*Kimlin*') to be as follows:

> To put it another way, winding up after a receiver and manager is appointed terminates his purely personal powers but not his in rem powers.
>
> The distinction between a receiver's and manager's in rem powers and his personal powers is this: the former flow from the security created by the debenture and relate to the assets of the company whereas the latter relate to everything else. So, for example, in *Sowman v David Samuel Trusts Ltd* [1978] 1 All ER 616, a receiver appointed over assets which included a mortgage debt could validly exercise the power of sale in the name of the company despite its liquidation. This power, being coupled with an interest, was irrevocable both at common law and by statute and accordingly, a power given to the receiver for the purpose of securing a benefit to the debenture holders was irrevocable as a power given to the debenture holders themselves. It was further held that the sale did not contravene s 227 of the Companies Act 1948 (equivalent to the Malaysian s 223) since although made in the name of the company, it was a sale of property which did not belong to the company but formed part of the debenture holder's security.

[33] In practice the liquidator exists side by side with the receiver with each exercising his separate powers and duties conferred on them by the Act in the case of the former and by the debenture in the case of the latter. There is no question of any ranking or of one being superior to the other or of one taking precedence of the other and as explained by Needham J in *Expo International Pty Ltd & Anor v Chant & Ors* [1979] 3 ACLR 888: '*a receiver, while he has a prior right to possession of the assets subject to the charge given to the person who appointed him*

over the right of the liquidator, nevertheless has possession for a limited purpose, namely, to comply with his duties to account to the mortgagee'.

[34] Coming to question 2, *Kimlin* was decided on its peculiar facts and are distinguishable from the facts of this appeal before us in that *Kimlin* was concerned with land charged under the National Land Code 1965 ('the Code') and as such no movable property was involved.

[35] The issue of law raised in *Kimlin* was whether a receiver and manager appointed under a debenture can proceed to sell the charged land by just obtaining the leave of the court without taking any proceedings under the Code. Before us the subject matter is entirely different in that it involves the enforcement of an equitable charge over movable property.

[36] *Kimlin* did not consider the effect of ss 233(1) and 277(5) of the Act and there was no necessity for *Kimlin* to do so, as the subject matter was land charged under the Code and which the then Supreme Court held could only be sold by the receiver and manager under the provisions of the Code by way of a judicial sale.

[37] *Kimlin* also posed the question as to whether s 223 of the Act prohibits the receivers and managers from making a valid disposition of the land after the commencement of the winding-up.

[38] After citing ss 4(1)(b) and 300(1)(b)(i) and (ii) of the Act, Edgar Joseph Jr FCJ, concluded '*that the clear implication is that liquidation does not merely terminate the agency of a receiver and manager but also his powers on winding-up since there is no estate for the receiver or manager to administer*'. (Emphasis added). The appellant relies heavily on this statement of the law to support his claim that since there is no estate for the second respondent to administer following KCL's liquidation, the second respondent cannot continue to retain the charged assets in their possession but must on pain of prosecution deliver such property to him.

[39] My only comments to such a claim are these. Firstly the learned judge's conclusion was based on the legality of a s 223 transaction concerning land. Secondly when referring to s 300(1)(b)(i), concerning the movable property that should be surrendered, the phrase '*and which he is required by law to deliver up*' that forms part of that subsection is noticeably missing leading me to imply that had the phrase been considered by the learned judge he may well have reached a different conclusion insofar as the charged assets consists of movables. For that reason I have my reservations on that part of his conclusion for in *Kimlin* there was no estate other than the lands charged under the code and that leaves the receivers with no estate to administer if they were unable to sell the lands. In this appeal, there is an estate to administer and although winding-up deprives the second respondent of their agency, it does not deprive them of their proprietary right to administer the estate.

[40] It is therefore my considered opinion that the principles of *Kimlin* should be restricted in scope and limited to the powers of the receiver and manager appointed under a power contained in an instrument to dispose of lands charged under the code. Those principles have no application to assets comprised in a fixed and floating charge contained in a debenture regardless of whether such assets are movables or immovables provided that such immovables are not charged under the Code based on the same rationale found in *Mastiara Sdn Bhd v Motorcycle Industries (M) Sdn Bhd & Ors* [1998] 3 CLJ 874 and expressed by Abdul Hamid Mohamad J (as he then was) as follows:-

> Furthermore the charges in question in *Kimlin*'s case were registered under the National Land Code 1965. Therefore, in my humble opinion, the better view is that, in view of the decision of the Federal Court in *Mahadevan*'s case, what is said in *Kimlin*'s case should be confined to charges registered under the Code. In other words, if a charge is registered under the Code, the remedy must be in accordance with the Code. If the charge in an equitable charge, outside the Code, the Code does not apply and chargee may enforce the remedy provided in the debenture. Otherwise, there would be a lacuna. The law (courts) recognizes equitable charges but no remedy is available.

[41] The position of the secured creditor is spelled out in s 291 of the Act. Sub-section (1) of that section provides that in every winding-up, all debts payable and all claims against the company shall be admissible to proof against the company. Sub-section (2) further provides for the automatic application of the bankruptcy law and rules in matters relating to:

(1) the respective rights of secured and unsecured creditors;

(2) debts provable; and

(3) valuation of annuities and future and contingent liabilities.

[42] The corresponding relevant provisions in the Bankruptcy Act 1967 is s 42 read together with Sch C, which sets out the mode of proof of debts for the secured and unsecured creditors.

[43] The effect of Sch C has been explained succinctly by Abdul Kadir Sulaiman J (as he then was) in the case of *Malayan Banking Bhd v The Official Assignee (Receivers of the estate of Velu Marimuthu (Bankrupt))* [1993] 2 AMR 48 p 3400 to be as follows:

> Paragraphs 9 to 17 of Schedule C to the Act concern the proof of debts by secured creditors like the plaintiff. Paragraph 9 allows a secured creditor to realize the security given by the debtor before his bankrupt. This is consonant with s 8(2) of the Act. Paragraph 10 allows a secured creditor to surrender his security to the Official Assignee for the general benefit of the creditors. Paragraph 11 allows a secured creditor to value his security and prove for the difference between the value and the amount of his debt. What can be implied from these paragraphs is that there would be another alternative to be chosen by a secured creditor in respect of the security, ie he may rely on his security and stand aside from the bankruptcy

proceedings altogether. So, with these four choices given to a secured creditor by the law, it is for him to choose any one of them in regard to the security. In *Chinese Tin Mines Rehabilitation Loans Board*'s case, Thomson J has this to say at p 66:

> As was pointed out by Jessel MR in the case of *Moor v Anglo-Italian Bank*: 10 Ch D 681 whether the creditor stands aside or comes in and proves is a case of election and does not involve any forfeiture of his rights. The creditors has two funds to resort to, the bankrupt's general estate, so as to get a dividend on the whole amount of his debt, or his security.

At p 67, his Lordship went further to state:

> It all comes back to a question of election. The creditor can come in or he can stay out. If he comes in he must submit to his debt being dealt with in accordance with the bankruptcy law which says in effect that only so much of it can count as against the other creditors. If he stays out he can do anything that the law allows him to do with his security as if there had been no question of bankruptcy. He can realize it or he can retain it.

In the present proceedings it is clear from the application made pursuant to s 148 of the Code for the sale of the secured property that the plaintiff wants to realize its security, in which case it would not be precluded from proving for any balance due should the amount realized be not sufficient to meet the debt due from the bankrupt pursuant to paragraph 9 of Schedule C to the Act. Its choice is, therefore, to realize its security.

[44] Added to this is the decision of this court in the case of *Director of Customs, Federal Territory* v *Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in liq)* [1995] 2 MLJ 600 confirming the secured creditor's status that he stands outside the liquidation and that he must be paid first in preference over other unsecured creditors.

[45] The combined effect of sub-ss 291(1) and (2) of the Act and s 42 of the Bankruptcy Act 1967, and Sch C thereto is that there is no mandatory requirement for a secured creditor to come under the liquidation. He has the option of either relying entirely on his security for which he is not obliged to submit a proof of debt. If he however decides to come under the liquidation, he submits proof of his debt and will be entitled to a dividend in respect of the unsecured portion. If he does not submit proof of his debt, then pursuant to para 16 of Schedule C, he shall be excluded from participating in a dividend.

[46] Question 4 poses the issue as to the status of a power of attorney granted by a company which is subsequently wound-up. That same issue was raised in the New Zealand case of *Wellington Steam Ferry Co (Ltd) (in liq) & Anor v The Wellington Deposit, Mortgage, and Building Association (Ltd)* [1915] 34 NZLR 913 when interpreting s 101 of the New Zealand Property Law Act 1908, the provisions of which are in pari materia with our s 6 of the Powers of Attorney Act 1949. In the course of his judgment, Stout CJ posed the following question:

> The rule of law is that a power of attorney is cancelled by the death of the donor if the latter is a natural person, or by dissolution if the donor is a corporation. An exception is made to this rule by the section which is the subject matter of this summons, and the question to be determined is: Does the exception apply to a power of attorney given by a corporation for valuable consideration and expressed to be irrevocable? Is such a power cancelled by the dissolution of the company, or does the section enable the power to remain operative?

[47] After considering a number of authorities His Lordship concluded as follows.

> I think also that these cases show that a company must on dissolution be considered as having ceased to exist for any purpose, and in the absence of special statutory provision an attorney cannot be agent of something that does not exist.

[48] From this it follows that a winding-up order does not cancel a power of attorney nor does s 4 read together with ss 300 and 305 of the Act. My answers to questions 1 to 3 would not be different if the instrument which provides for the appointment of a receiver and manager incorporates a power of attorney as well.

[49] Rule 163 of the Rules, the subject matter of question 5 contains the following provisions:

> Where an order has been made for the winding-up of a company the judge shall have power without further consent to order the transfer of him of any action cause or matter pending brought or continued by or against the company.

[50] That rule gives power to a judge to transfer to himself any action, cause or matter pending, brought or continued by or against the company. On my reading of the rule, the judge has the discretion to order such a transfer as the rule provides that the court 'shall have the power' and not 'shall transfer to itself'. As such there is no mandatory requirement that a winding-up court order transfer of all related matters instituted in the courts to itself.

[51] Under r 78 of the Rules, every creditor shall prove his debt unless exempted by the judge. The mode of such proof is provided by r 79, namely by sending to the liquidator an affidavit verifying the debt together with the prescribed filing fee. Then comes r 82 which requires the affidavit to state whether the creditor is or is not a secured creditor.

[52] It is the appellant's contention that references to '*every creditor*' in r 78 and '*secured creditor*' in r 82 impose a duty on the secured creditor to prove his debt as well.

[53] I have already stated earlier on that a secured creditor can rely exclusively on his security for payment and is not obliged to submit a proof of debt. However if he gives up his security and prove for the whole debt or wishes to prove his unsecured portion, he must submit his proof of debt. This is clear from paras 9–16 of Sch C of the Bankruptcy Act 1967. It is under these circumstances that the secured creditor has to comply with rr 78 and 82.

[54] Following my interpretation of the relevant laws and their application to the cases cited, I answer the six questions posed to us in the following manner:

(1) …

(i) Upon the winding-up of a company and the appointment of a liquidator, the receiver and manager ceases to be the agent of the company but he continues to retain his possessory rights conferred upon him by the debenture to take custody and control of all the assets charged under the debenture.

(ii) Section 233 and/or s 277 of the Act, read together with ss 300 and 305 of the same Act and r 66 of the Rules do not apply to a receiver and manager appointed pursuant to a power contained in a debenture and the receiver and manager is entitled to possession and control of the charged assets despite a demand made by the liquidator for their return, unless those assets are redeemed by the liquidator or there is a surplus of proceeds which has to be returned to the liquidator.

(iii) Following a winding-up, the receiver and manager loses his status as agent of the company. He continues to retain his possessory powers as a receiver and manager whilst the liquidator exercises his statutory powers and duties under the Act. There is no question of any superior ranking. They exist side by side with each exercising his separate powers and duties conferred on them by the Act in the case of the liquidator and by the debenture in the case of the receiver and manager.

(2) The principles in *Kimlin* should be restricted in scope and limited to the powers of a receiver and manager to sell land charged under the Code. *Kimlin* should not apply to assets comprised in a fixed and floating charge contained in a debenture. The assets may include immovable as well provided they are not charged under the Code.

(3) On the authority of *Director of Customs, Federal Territory*, a receiver and manager appointed pursuant to an instrument operates outside the winding-up, unless of course he intends to claim in the liquidation in which case he has to prove his debt.

(4) A winding-up order does not cancel a power of attorney nor does s 4 read together with ss 300 and 305 and the other provisions of the Act. Thus my answers to questions 1 to 3 would not be different if the debenture which provides for the appointment of a receiver and manager incorporates a power of attorney as well.

(5) Rule 163 of the Rules gives a discretion to the winding-up judge to transfer any action, cause or matters that are pending or instituted or may be instituted in the other courts. There is no mandatory requirement in r 163 to order such transfers.

(6) A secured creditor is not obliged to submit a proof of debt when called upon to do so by the liquidator if he relies upon his security for payment. He need only submit his proof of debt if he gives up his security and proves for the whole debt or if he decides to prove for the unsecured portion.

[55] Finally I come to the five orders, upon which the six questions of law are based.

[56] The appointment order was made under s 236(1)(e) of the Act and was not opposed by the respondents. Nevertheless the High Court set it aside and the Court of Appeal considered it to be inapplicable in its judgment. Before us, counsel for the first respondent made no reference in his written submission and both the appellant and second respondent merely alluded to it. As this is a non-starter, there is nothing more to be said on this appointment order.

[57] It is clear from the language of r 163 of the Rules that the jurisdiction to transfer relates only to matters brought by or against the company. Originating Summons D6–24–98 of 1992, which was filed by the appellant in the Commercial Division of the High Court and for which he seeks a transfer to the winding-up court, was filed by the appellant in his personal name as liquidator of KCL. As such, it is not an action brought by the company. Since the Commercial Division of the High Court has jurisdiction to hear the Originating Summons, transfer of it to the winding-up court becomes unnecessary particularly when the insolvency of KCL has nothing to do with the challenge to the validity of the debenture and the appointment of the second respondent as receivers and managers. For that reason the Court of Appeal was correct when it affirmed the decision of the High Court to set aside the transfer order.

[58] When answering questions 3 and 6, I have already dealt at length the relevant provisions of the Act and Rules as to the status of the secured creditor and that he has the option to choose any of the methods given to him under the law to realize his security. He can:

(1) realize his security and stand outside the liquidation.

(2) surrender his security under para 10 of Sch C and prove for the whole debt.

(3) value his security and prove for the unsecured balance under para 11 of Sch C.

[59] The secured creditor initiates the process of enforcing his security and to that end there is no obligation on the part of the liquidator to issue any notice to the secured creditor to prove his debt. As such, the proof order cannot be maintained.

[60] I have already dealt with ss 233 and 277(5) of the Act and have concluded that the appellant has no right to demand the return of the charged assets in the second respondent's possession. Since there is a dispute over

claims to the charged assets, this will be finally determined when the originating summons which the appellant had initiated against the second respondent is heard and disposed off. Until that issue is determined in the appellant's favour, the debenture is valid and so is the appointment of the second respondent as receivers and managers and to that end the setting aside of the acquiring order has been correctly made.

[61] Whilst s 236(2)(a) empowers the appellant to institute an action in court, it does not require him to obtain the leave of the court to do so. To that extent, the commencement of proceedings order is superfluous and unnecessary.

[62] The appellant's reliance on s 237(3) is also misplaced as the scope of that section is confined to guidance on matters of law or principle and not on commercial decisions. The purpose of his getting the order is to enable him to file a suit against the first respondent to recover two sums of money totalling RM9.745 million which he maintains had been wrongly paid by KCL to the first respondent and which should be returned to him as the liquidator. From the very nature of the suit to be filed, the decision to commence such a proceeding is very much a commercial decision. In *Sanderson v Classic Car Insurances Pty Ltd* [1985] 10 ACLR 115, the Supreme Court of New South Wales had to consider the scope of s 379(3) of the Companies Code which is in pari materia with our s 237(3). At p 116 of the report, Young had this to say: '*Although s 379(3) of the Companies Code is expressed in wide terms, it seems clear that it does not permit the liquidator or a provisional liquidator to come to the court whenever he feels some unease about a situation and wishes to obtain some sort of insurance against the possibility of error as well as an assurance that he is on the right track*'. That Australian case also listed the following four classes of cases where s 379(3) is applicable:

(a) guidance to the liquidator on matters of law; see eg *Re Australian Home Finance Pty Ltd* [1956] VLR 1 and; *Re Standard Insurance Co Ltd* [1963] 80 WN (NSW) 1355;

(b) questions involving legal procedure (eg whether a liquidator should settle curial proceedings, and if so, on what terms);

(c) whether a liquidator should act on his commercial judgment to postpone a sale because he recognizes his legal duty ordinarily requires him to reduce the company's assets into cash as soon as possible and to distribute (an example is *Re Statewide Investments Ltd*); or

(d) where there are two or more competing purchasers for the company's property and the liquidator can see that it may be alleged that the liquidator has acted mala fide or in an absurd or unreasonable or illegal way, see *Re Bayswood Pty Ltd* [1981] 6 ACLR 107 at 113.

[63] *Sanderson* was followed in *Re Kian Joo Holdings Sdn Bhd (in liq); Mohd Jabbar bin Abdul Majid* [1999] 6 MLJ 352.

[64] On the facts of this case, no leave is necessary for the appellant to commence the proceedings since s 236(2)(a) of the Act is broad enough to allow him to do so.

[65] For all the reasons that appear in this judgment, I find no merit in this appeal and on that conclusion, it is dismissed with costs and the deposit is to be paid out to the respondents to account of their taxed costs.

[66] Both my brothers, Haidar Mohd Noor CJ (Malaya) and Abdul Malek Ahmad FCJ concur with my findings and conclusion and that this appeal be dismissed with costs and the deposit be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Reported by Loo Lai Mee